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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

RICHARD GIBSON, and HERIBERTO  
VALIENTE.

Case No. 2:23-cv-00140-MMD-DJA

Plaintiff,

v.

MGM RESORTS INTERNATIONAL,  
CENDYN GROUP, LLC, THE RAINMAKER  
GROUP UNLIMITED, INC., CAESARS  
ENTERTAINMENT INC., TREASURE  
ISLAND, LLC, WYNN RESORTS HOLDINGS,  
LLC.

**REPLY MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANTS' JOINT  
MOTION TO DISMISS**

## **ORAL ARGUMENT REQUESTED**

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**PRELIMINARY STATEMENT**

Plaintiffs' opposition (ECF No. 109 ("Opp.")) attempts to obscure the complaint's deficiencies by ignoring controlling precedent, distorting a nearly 100-year-old opinion, and manufacturing allegations and a claim that are not in the complaint and, in any event, are not viable as a matter of law. Those efforts cannot rescue plaintiffs' threadbare complaint from dismissal.

First, instead of demonstrating that the complaint answers the Ninth Circuit's "basic" pleading questions—"who, did what, to whom (or with whom), where, and when?" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)—plaintiffs rely on cases from outside the Ninth Circuit to argue that this Court should apply a different standard. But plaintiffs make no effort to distinguish their complaint from those that courts in the Ninth Circuit have routinely dismissed. Nor could they, because plaintiffs cannot identify (1) a single individual "who" participated in the purported conspiracy, (2) "when" it began, or (3) how it was formed, operated, or enforced.

Second, the opposition confirms that plaintiffs do not plead any facts to support their claim that Hotel Defendants agreed to adopt pricing recommendations from the Revenue Management Products for their hotels on the Las Vegas Strip.<sup>1</sup> Indeed, plaintiffs do not dispute that they fail to plead (1) direct evidence of that supposed horizontal agreement or (2) that any Hotel Defendant adopted a Revenue Management Product's pricing suggestion even once—let alone that all Hotel Defendants did so in parallel. And plaintiffs concede that the complaint's "plus factors" are irrelevant absent a properly pleaded allegation that defendants acted in parallel.

Having failed to meet their pleading burden, plaintiffs try to evade it. They claim that *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), permits them to forgo pleading an agreement among Hotel Defendants and simply to allege that each Hotel Defendant somehow knew that every other Hotel Defendant entered into an agreement with Rainmaker to adopt a Revenue Management Product's pricing suggestions. But plaintiffs misstate both the law and their allegations. The Ninth Circuit has squarely rejected plaintiffs' reading of *Interstate Circuit* and held that a hub-and-spoke claim without an agreement among the spokes "is not a hub-and-spoke conspiracy at all." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 n.3

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<sup>1</sup> Capitalized terms not defined herein have the meanings set forth in defendants' memorandum of law in support of their joint motion to dismiss. (ECF No. 91 ("Mem.").)

<sup>1</sup> (9th Cir. 2015). In any event, plaintiffs do not plead that any Hotel Defendant ever adopted  
<sup>2</sup> Rainmaker’s pricing suggestions, let alone agreed with Rainmaker (or anyone else) to do so.

3       Third, in a last-ditch effort to rescue their complaint, plaintiffs assert—for the first time—  
4 that they are challenging the (unpledged) “vertical agreements” between each Hotel Defendant and  
5 Rainmaker to “use” a Revenue Management Product’s pricing suggestions. The Court should  
6 reject that pivot because the only agreement challenged in the complaint is the alleged horizontal  
7 agreement among Hotel Defendants. Besides, the complaint fails to allege supposed vertical  
8 agreements or the scope of those agreements. To the contrary, the complaint demonstrates that  
9 hotels utilizing Revenue Management Products were free to reject any pricing suggestion.

## ARGUMENT

## I. PLAINTIFFS HAVE NO ANSWERS TO KENDALL'S "BASIC" QUESTIONS

The opposition confirms that plaintiffs have not pleaded answers to the Ninth Circuit’s “basic” threshold questions articulated in *Kendall*. Instead, plaintiffs dismiss *Kendall*’s controlling standard as “dicta[] in a footnote” and relegate it to the end of their brief. (Opp. at 24.) But the Ninth Circuit has repeatedly affirmed that “plaintiffs must plead evidentiary facts: ‘who, did what, to whom (or with whom), where, and when.’” See, e.g., *Musical Instruments*, 798 F.3d at 1194 (quoting *Kendall*, 518 F.3d at 1048). Plaintiffs also cannot dispute that the Ninth Circuit has affirmed dismissal of complaints that provided better answers to those questions than plaintiffs do here. See, e.g., *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 691 F. App’x 389, 390-91 (9th Cir. 2017) (“[The] allegations identifying specific agreements between certain defendants fare no better [because] these allegations fail to explain where and when any such agreement was consummated . . .”). Plaintiffs rely almost exclusively on out-of-circuit authority, and none of their “answers” to *Kendall*’s “basic” questions are sufficient under Ninth Circuit law:

24       **Who:** Citing no authority, plaintiffs incorrectly argue they have adequately answered this  
25 question because the “who” is “Operators, whose . . . likely scores of employees across multiple  
26 companies . . . are plausibly alleged to have used Rainmaker’s algorithms and adopted its pricing.”  
27 (Opp. at 22.) But *Kendall* bars answering the “who” question so vaguely; it held that identifying  
28 “banks” as the alleged conspirators was insufficient. 518 F.3d at 1048. Plaintiffs’ speculation—

1 not alleged in the complaint—that “likely scores of employees” adopted Rainmaker’s algorithms  
 2 (Opp. at 22 n.77) only highlights the deficiencies in their pleading because plaintiffs cannot  
 3 identify even one such employee. *See Kendall*, 518 F.3d at 1047 (reasoning that the need to  
 4 identify employees is acute where defendants “are large institutions with hundreds of employees”).

5 **When:** Citing two opinions from the Northern District of Illinois, plaintiffs assert it “is not  
 6 the law” that they must plead “exactly when a conspiracy was formed.” (Opp. at 23.) But  
 7 plaintiffs, once again, have no answers for authority within the Ninth Circuit holding that their  
 8 admission that the conspiracy “beg[an] at a time currently unknown” (ECF No. 1 ¶ 87) is fatal.  
 9 (*See Mem.* at 8-9.) Instead, plaintiffs speculate that the conspiracy could have begun in 2012 when  
 10 Treasure Island allegedly started subscribing to a Revenue Management Product, in 2015 or 2017  
 11 “when Rainmaker introduced new pricing algorithms,” or in 2019 at the start of the class period.  
 12 (Opp. at 23.)<sup>2</sup> But guesses spanning a nearly ten-year timespan do not “give a defendant seeking to  
 13 respond to allegations of a conspiracy an idea of where to begin.” *Kendall*, 518 F.3d at 1047; *see also Cal. Crane Sch., Inc. v. Google LLC*, No. 21-CV-10001 (HSG), 2023 WL 2769096, at \*5  
 14 (N.D. Cal. Mar. 31, 2023) (dismissing conspiracy claim where “critically, Plaintiff acknowledges  
 15 that it ‘do[es] not know when the agreement was originally formed’” (alteration in original)).

16 **What:** Plaintiffs do not meaningfully dispute that the Ninth Circuit decisions cited by  
 17 defendants dismissed complaints for failing to allege what defendants did to form an agreement,  
 18 how any supposed agreement would operate, or how defendants monitor or enforce compliance  
 19 with any such agreement. (*Mem.* at 8-10.) Rather, they argue that those decisions are inapplicable  
 20 because the claims there “either (1) did not plead vertical agreements or (2) . . . rested on the  
 21 existence . . . of specific agreements between defendants.” (Opp. at 23.)

22 Not only are those purported distinctions at odds with blackletter law establishing that an  
 23 agreement among Hotel Defendants is an essential element of plaintiffs’ claim (*see infra* pp. 8-9),  
 24 they do nothing to distinguish *Kendall*. In *Kendall*, the plaintiffs alleged that the bank defendants  
 25

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26  
 27 <sup>2</sup> Plaintiffs argue that they “plausibly allege that . . . [Hotel] Operators have entered into  
 28 agreements with Rainmaker since at least 2012” (Opp. at 23), but they do not dispute that the  
 complaint pleads nothing about when (if at all) Caesars, MGM, or Wynn entered any such  
 agreement regarding their hotels on the Las Vegas Strip. (*Mem.* at 14.)

1 entered into vertical agreements with the credit card networks and that “there is an agreement  
 2 among all [the banks] to charge a minimum merchant discount fee set by the [credit card  
 3 networks].” 518 F.3d at 1048. Yet the Ninth Circuit affirmed dismissal because there were “no  
 4 facts alleged to support . . . what” the banks did to form such an agreement. *Id.* Plaintiffs’ second  
 5 purported distinction of *Kendall* and its progeny is also unavailing because, as in *Kendall*,  
 6 plaintiffs’ claim here rests on an unsubstantiated horizontal agreement—i.e., the purported  
 7 “agreement among [Hotel] Defendants to use pricing algorithms provided by Rainmaker.” (ECF  
 8 No. 1 ¶ 88.) But like the plaintiffs in *Kendall*, plaintiffs here “do not allege any facts to support  
 9 their theory that [Hotel Defendants] conspired or agreed with each other.” 518 F.3d at 1048.

10 Finally, while plaintiffs contend they answered the “what” for their new—and unpledged—  
 11 theory that “each [Hotel Defendant] entered into a[] [vertical] agreement with Rainmaker to use its  
 12 algorithms” (Opp. at 16), the complaint fails to explain what it means to agree to “use” Revenue  
 13 Management Products that—as plaintiffs concede—have other functionalities besides pricing  
 14 suggestions. (*Id.* at 4.) And to the extent plaintiffs contend that “use” means “adopt suggested  
 15 prices,” plaintiffs do not dispute that the complaint fails to allege that any Hotel Defendant ever  
 16 adopted a Revenue Management Product’s suggested price for any room at a hotel on the Strip.

17 Plaintiffs instead assert “that (1) Rainmaker’s algorithms are used by 90% of the hotels on  
 18 the Strip; [and] (2) that Rainmaker’s pricing recommendations are accepted 90% of the time.” (*Id.*  
 19 at 22-23.) The first assertion is not alleged in the complaint. Rather, the complaint alleges that  
 20 “Rainmaker Group’s products are used by 90% of the hotels on the Las Vegas Strip” (ECF No. 1 ¶  
 21 7) (emphasis added), but conspicuously does not allege that any Hotel Defendant “used” an  
 22 algorithm—let alone adopted its pricing suggestions. Thus, alleging that some hotels on the Strip  
 23 use Rainmaker products does not suggest that any Hotel Defendant adopted any algorithm’s  
 24 pricing suggestions. Plaintiffs fare no better with their allegation that Rainmaker’s pricing  
 25 suggestions are accepted 90% of the time. On its face, that statistic refers to all of Rainmaker’s  
 26 customers, and there are 32,000 hotels that subscribe to Rainmaker’s services—suggesting Hotel  
 27 Defendants’ properties on the Strip represent a vanishingly small fraction.<sup>3</sup> Indeed, the Ninth  
 28

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<sup>3</sup> Cendyn, *Customers*, available at <https://www.cendyn.com/customers/> (last visited June 9, 2023).

1 Circuit in *Musical Instruments* squarely rejected allegations relying on such market-wide data as  
 2 too “overinclusive” to plausibly allege that the defendants conspired. 798 F.3d at 1197 & n.12.

3 In attempting to satisfy the *Kendall* standard, plaintiffs cite only one case within the Ninth  
 4 Circuit—*In re Fresh & Process Potatoes Antitrust Litigation*, 834 F. Supp. 2d 1141 (D. Idaho  
 5 2011). But *Potatoes* only highlights the complaint’s deficiencies because plaintiffs here do not  
 6 furnish answers to the questions that the *Potatoes* complaint answered. *See id.* at 1163 (“This  
 7 complaint does answer the basic who-what-where-when question. Specifically: Who? Twenty-  
 8 three growers . . . When? Fall 2004. Where? An office in Blackfoot, Idaho.”). Accordingly, the  
 9 complaint should be dismissed because it has no well-pleaded answers to *Kendall*’s questions.

10 **II. PLAINTIFFS FAIL TO PLAUSIBLY ALLEGE A HORIZONTAL AGREEMENT**

11 Plaintiffs’ claim should also be dismissed because they fail to plead direct or circumstantial  
 12 evidence plausibly suggesting that Hotel Defendants reached any agreement. Instead, plaintiffs  
 13 argue that they need not plead an agreement among Hotel Defendants, or alternatively, that Hotel  
 14 Defendants’ alleged knowledge that the other Hotel Defendants had purportedly entered into  
 15 vertical agreements with Rainmaker to “use” prices suggested by Revenue Management Products  
 16 would be sufficient. (Opp. at 6-15.) Neither argument has a home in the complaint or the law.

17 **A. Plaintiffs Do Not Plead Direct or Circumstantial Evidence of An Agreement**

18 Plaintiffs concede that they fail to plead direct evidence of a conspiracy, and they fail to  
 19 meaningfully defend their insufficient pleading of circumstantial evidence.

20 **1. The Ninth Circuit Has Rejected Plaintiffs’ Parallel Conduct Argument**

21 Plaintiffs argue that the “parallel conduct here is [Hotel Defendants’] use of the same  
 22 algorithmic approach to pricing” (*id.* at 12), but this assertion is insufficient to allege parallel  
 23 conduct because plaintiffs do not dispute that they fail to allege a single instance in which any  
 24 Hotel Defendant (i) adopted a price suggested by a Revenue Management Product—much less did  
 25 so in parallel with others; or (ii) priced rooms at the same rate as another Hotel Defendant. (Mem.  
 26 at 14-15.)

27 Plaintiffs contend that they do not need to allege facts showing any agreement because the  
 28 Court can infer collusion from the allegations that “Rainmaker’s marketing materials tout that its

1 recommendations are accepted ‘90%’ of the time.” (Opp. at 10-12.) That alleged market-wide  
 2 average rate of acceptance, however, does not suggest that any Hotel Defendant accepted those  
 3 recommendations (*see supra* p. 5)—let alone that they all did so contemporaneously.

4 Plaintiffs argue that timing is immaterial because courts have accepted actions taken “five  
 5 years” apart as sufficiently parallel. (Opp. at 11.) But the Ninth Circuit has squarely held the  
 6 opposite where “defendants adopted the policies over a period of several years” because “such  
 7 slow adoption of similar policies does not raise the specter of collusion.” *Musical Instruments*, 798  
 8 F.3d at 1196. Thus, plaintiffs’ attempt to plead parallel conduct fails as a matter of law.

9           2.       Plaintiffs’ “Plus Factors” Are Irrelevant

10 Plaintiffs next argue that, because they supposedly have pleaded plus factors, the Court can  
 11 infer that they have alleged an agreement. But plaintiffs do not dispute that “plus factors” are  
 12 irrelevant when, as here, the complaint fails to adequately allege parallel conduct. (Mem. at 13,  
 13 16.) But even if the Court considered the “plus factors,” plaintiffs’ opposition confirms that they  
 14 do not render the purported agreement among Hotel Defendants any more plausible.

15       **Market concentration:** Plaintiffs do not engage with Ninth Circuit authorities holding that  
 16 market concentration alone does not render an inference of conspiracy plausible. In fact, a decision  
 17 on which plaintiffs rely holds that “large market share . . . does not count as a plus factor.”

18 *Litovich v. Bank of Am. Corp.*, 568 F. Supp. 3d 398, 432 (S.D.N.Y. 2021) (quoted at Opp. at 12).<sup>4</sup>

19       **Information exchange and trade associations:** Plaintiffs do not dispute that the complaint  
 20 fails to allege that any Revenue Management Product facilitated the exchange of any non-public  
 21 information between Hotel Defendants. (Mem. at 17-18.) Instead, plaintiffs rely on their  
 22 allegations that Hotel Defendants uploaded “transactional-level data” to Revenue Management  
 23 Products (Opp. at 13), but plaintiffs do not allege that Rainmaker ever shared the data of one Hotel  
 24 Defendant with another. Plaintiffs also do not dispute that they failed to allege that any Hotel  
 25 Defendant attended a conference hosted by Rainmaker. Rather, they argue that the numerous  
 26 authorities cited by defendants holding that mere attendance at trade association meetings is not a

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27       <sup>4</sup> Defendants assume plaintiffs intended to cite *Litovich*; although plaintiffs selectively quote that  
 28 opinion, they fail to provide a citation to it. Plaintiffs also mischaracterize *In re Dynamic Random  
 Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42 (9th Cir. 2022), but cannot  
 dispute that the court held that market concentration by itself is insufficient. *Id.* at 45.

1 plus factor are inapplicable because “unlike here, there was no allegation that the defendants used  
 2 meetings in the same way . . . i.e., as a specific mechanism for coordinated price-setting.” (*Id.*)  
 3 But plaintiffs allege virtually nothing about any trade association meeting hosted by Rainmaker, let  
 4 alone that Hotel Defendants used those meetings as a “mechanism” to jointly adopt prices  
 5 suggested by a Revenue Management Product or exchange “competitively sensitive” information.

6       **Fungibility of hotel rooms:** Plaintiffs argue it is “premature” to consider whether Hotel  
 7 Defendants’ rooms on the Las Vegas Strip are fungible (*id.* at 14), but do not dispute that they fail  
 8 to plausibly suggest that a prospective guest would book a room at the Wynn if Treasure Island  
 9 were sold out. (Mem. at 18-19.) And “common sense” here directs that plaintiffs’ conclusory  
 10 allegation regarding the fungibility of every room at every hotel managed by Hotel Defendants on  
 11 the Strip is “not natural,” but rather “contorted to meet their litigation needs.” *Hicks v. PGA Tour,*  
 12 *Inc.*, 897 F.3d 1109, 1121 (9th Cir. 2018) (citation omitted).

13       **The complaint offers non-conspiratorial alternatives:** In response to defendants’  
 14 argument that a hotel could be motivated to unilaterally subscribe to a Revenue Management  
 15 Product because those products improve revenue and demand forecasting (Mem. at 19), plaintiffs  
 16 argue that the complaint alleges “over-discounting is only prevented if [Hotel] Operators take the  
 17 same approach to pricing.” (Opp. at 14.) But Plaintiffs do not allege that any Hotel Defendant  
 18 adopted algorithmic pricing recommendations or that using Rainmaker products would help Hotel  
 19 Defendants increase their profits only if other Hotel Defendants did the same. *See William O.*  
 20 *Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009) (“*Gilley II*”) (rejecting  
 21 Section 1 claim where plaintiffs’ allegations failed to show that defendants’ actions “were part of  
 22 any agreement or conspiracy, rather than independent efforts to maximize profits”). Rather,  
 23 plaintiffs’ unadorned theory that hotels would only collectively adopt a Revenue Management  
 24 Product’s pricing suggestions is undermined by their allegation that Treasure Island began  
 25 subscribing to those products well before any other Hotel Defendant. (*Compare* ECF No. 1 ¶ 16  
 26 (suggesting Treasure Island began subscribing to Revenue Management Products in 2012), *with id.*  
 27 ¶ 11 n.6 (citing article suggesting other Hotel Defendants subscribed to unidentified products in  
 28 ///

1 2015)). While plaintiffs point to allegations regarding gas stations in Germany and Uber (*id.* ¶¶ 62-  
 2 65), those allegations obviously say nothing about Hotel Defendants.

3       **B.     Plaintiffs Misstate the Law Regarding “Hub-and-Spoke” Conspiracies**

4 Plaintiffs incorrectly cite *Interstate Circuit* to argue that they need not plead an agreement  
 5 among Hotel Defendants as long as they plead: “(1) vertical agreements and (2) knowledge among  
 6 horizontal competitors that each was entering into the same vertical agreement.” (Opp. at 9.)  
 7 Plaintiffs mischaracterize *Interstate Circuit* and plead neither vertical agreements nor knowledge of  
 8 those unalleged agreements among Hotel Defendants.

9       1.     Plaintiffs Must Allege An Agreement Among Hotel Defendants

10 “[T]he crucial question” in a Section 1 case “is whether the challenged anticompetitive  
 11 conduct ‘stem[s] from . . . an agreement, tacit or express.’” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
 12 544, 553 (2007) (citations omitted). That “crucial question” is the same when a complaint alleges a  
 13 hub-and-spoke conspiracy, as plaintiffs must plead the “spokes . . . that enter into vertical  
 14 agreements with the hub” and “the rim of the wheel, which consists of horizontal agreements  
 15 among the spokes” because “a rimless hub-and-spoke conspiracy is not a hub-and-spoke  
 16 conspiracy at all . . . .” *Musical Instruments*, 798 F.3d at 1192 & n.3. Therefore, “[t]he critical  
 17 issue for establishing a . . . hub and spoke system is how the spokes are connected to each other.”  
 18 *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010) (citation omitted).

19       *Interstate Circuit* is not to the contrary. There, a theater chain, Interstate, wrote to eight  
 20 distributors at the same time, asking them to restrict further distribution to second-run theatres in  
 21 exchange for their “continued exhibition of the distributors’ films.” 306 U.S. at 216-17. The letter  
 22 was addressed to all eight distributors, each of whom “was aware” that “without substantially  
 23 unanimous action . . . there was risk of a substantial loss of the business and good will.” *Id.* at 222.  
 24 Thus, the “[k]ey to *Interstate Circuit*’s conspiracy finding was its determination that each  
 25 distributor’s decision to accede to Interstate’s demands would have been economically self-  
 26 defeating unless the other distributors did the same” because the demands otherwise offered “no  
 27 reasonable prospect of countervailing benefits.” *Ins. Brokerage*, 618 F.3d at 331; *see also United*  
 28 *States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015) (explaining that under *Interstate Circuit*, a

1 conspiracy can be inferred where “multiple competitors sign vertical agreements that would be  
 2 against their own interests”) (cited at Opp. at 7, 11). It is thus well established that *Interstate*  
 3 *Circuit* “does not relieve plaintiffs of the obligation to allege facts ‘plausibly suggesting . . . a  
 4 common design and understanding’” among the spokes. *Ins. Brokerage*, 618 F.3d at 331.

5 The “key to *Interstate Circuit*’s conspiracy finding,” *id.*, is absent here because plaintiffs  
 6 have not alleged that a Hotel Defendant would only use a Revenue Management Product if all  
 7 Hotel Defendants unanimously did so at the same time. To the contrary, plaintiffs allege that: (1)  
 8 the Revenue Management Products provided individual user hotels “countervailing benefits,” *id.*,  
 9 such as “real-time data” (ECF No. 1 ¶ 45); and (2) Hotel Defendants started using those products at  
 10 different times (*see supra* p. 7).

11           2.       Knowledge of Unalleged Vertical Agreements Is Insufficient

12 Plaintiffs argue that Hotel Defendants’ knowledge “that their competitors” entered into  
 13 “vertical agreements” with Rainmaker to “use” its pricing suggestions plausibly suggests Hotel  
 14 Defendants agreed among themselves to use those pricing suggestions (Opp. at 8-9), but their  
 15 argument finds no support in the complaint or the law.

16       First, plaintiffs have failed to plausibly allege that any Hotel Defendant entered into a  
 17 vertical agreement to adopt a Revenue Management Product’s pricing suggestions. While  
 18 plaintiffs assert in their opposition that “90% of hotels [on] the Strip use Rainmaker’s pricing  
 19 algorithms” (Opp. at 15-16), the complaint does not plead any such fact, as explained previously  
 20 (*see supra* p. 4). And the allegation that the Revenue Management Products’ pricing suggestions  
 21 are adopted 90% of the time across all subscribers does not plausibly suggest that Hotel Defendants  
 22 adopted those suggestions at their hotels on the Strip. (*See supra* pp. 4-5.)

23       Moreover, by acknowledging that prices suggested by a Revenue Management Product are  
 24 only accepted by subscribers some of the time, the complaint pleads that any hotel receiving a  
 25 pricing suggestion was free to decline it. It is well-settled that non-binding pricing suggestions are  
 26 insufficient to plead a vertical agreement to use the price suggested. *See Gen. Cinema Corp. v.*  
 27 *Buena Vista Distrib. Co.*, 681 F.2d 594, 597 (9th Cir. 1982) (holding that contract providing  
 28 recipient discretion to decline pricing suggestions was not a vertical agreement on price); *Acquaire*

1 *v. Canada Dry Bottling Co. of N.Y.*, 24 F.3d 401, 410 (2d Cir. 1994) (“Evidence of pricing  
 2 suggestions . . . is not sufficient . . . to transgress § 1 of the Sherman Act.”). Thus, because  
 3 plaintiffs themselves concede that hotels receiving a pricing recommendation from a Revenue  
 4 Management Product were free to decline it, plaintiffs have failed to plead that each Hotel  
 5 Defendant entered into a vertical agreement with Rainmaker to “use” those pricing suggestions.

6 The cases plaintiffs cite are not to the contrary. For example, plaintiffs rely on *William O.  
 7 Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, 561 F.3d 1004 (9th Cir. 2009) (“*Gilley I*”), to  
 8 argue that a vertical agreement can be inferred even when the agreement does not “control prices.”  
 9 (Opp. at 16 n.49.) But the Ninth Circuit withdrew that portion of the opinion and declined to  
 10 embrace it in *Gilley II*. Indeed, plaintiffs’ unpled theory suffers from similar defects identified  
 11 in *Gilley II*, namely that plaintiffs “do[] not clearly assert which individual agreement or  
 12 agreements constitute . . . a ‘contract [that] restrain[s] trade.’” 588 F.3d at 669 (citation omitted).

13 Second, plaintiffs fail to allege that any Hotel Defendant knew that another Hotel  
 14 Defendant purportedly agreed with Rainmaker to adopt a Revenue Management Product’s pricing  
 15 suggestions. While plaintiffs invoke their allegation that Hotel Defendants “probably knew” that  
 16 their competitors “participate in and contribute data to” the Revenue Management Products (ECF  
 17 No. 1 ¶¶ 10, 22, 74), plaintiffs cannot point to any allegation that Hotel Defendants knew that other  
 18 Hotel Defendants were using a Revenue Management Product’s pricing suggestions.

19 Third, even had plaintiffs adequately pleaded that each Hotel Defendant separately agreed  
 20 with Rainmaker to adopt a Revenue Management Product’s pricing suggestions and that each  
 21 Hotel Defendant knew that every other Hotel Defendant had reached such an agreement, that still  
 22 would be insufficient. Indeed, “firms may engage in consciously parallel conduct through  
 23 observation of their competitors’ decisions, even absent an agreement.” *Musical Instruments*, 798  
 24 F.3d at 1195. And the Ninth Circuit has rejected plaintiffs’ reading of *Interstate Circuit*, holding  
 25 that it cannot be read to permit plaintiffs to establish an agreement based on “conscious  
 26 parallelism.” See *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1266-67 (9th Cir. 1983).<sup>5</sup>

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27 <sup>5</sup> The opinions plaintiffs cite (Opp. at 7-9) are distinguishable because each emphasized that the  
 28 plaintiffs had allegations extending “[b]eyond just ‘conscious parallelism.’” *In re Keurig Green  
 Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp 3d 187, 244-45 (S.D.N.Y. 2019); see  
 (cont’d)

### **III. PLAINTIFFS' UNPLEADED VERTICAL AGREEMENT THEORY FAILS**

Plaintiffs cannot rescue their complaint with their new argument that they challenged vertical agreements between each Hotel Defendant and Rainmaker, because that theory is not alleged in the complaint, and even if it were, it would fail at every step.

Courts routinely refuse to supplement a plaintiff's allegations in search of possible unpledged antitrust violations. *See, e.g., Gilley II*, 588 F.3d at 669 ("The SAC is not saved by the argument that it could be read to encompass a claim that the individual agreements . . . constitute a restraint of trade because the SAC does not provide the defendants fair notice of such a claim . . . ."); *see also Sabina v. James River Ins. Co.*, No. 22-CV-1456 (JCM), 2020 WL 6545866, at \*2 (D. Nev. Nov. 6, 2020) ("[T]he court cannot consider new facts alleged in Sabina's opposition to a motion to dismiss.").

Here, the only agreement challenged in the complaint is a single “agreement among [Hotel] Defendants to use pricing algorithms provided by Rainmaker.” (ECF No. 1 ¶ 88 (emphasis added); *see also id.* ¶ 3 (“The Hotel Operators have colluded to adopt these algorithms.”).) Nowhere does the complaint challenge vertical agreements between each Hotel Defendant and Rainmaker; in fact, the complaint does not mention the word “vertical” at all. And even assuming that plaintiffs had pleaded a challenge to “vertical agreements,” the complaint would still fail to plausibly allege the elements—an agreement, relevant market, and anticompetitive harm—necessary to challenge the supposed vertical agreements. For starters, plaintiffs fail to plausibly allege that any Hotel Defendant agreed with Rainmaker to adopt a Revenue Management Product’s pricing suggestions; to the contrary, they concede that hotels were free to reject them. (*See supra* pp. 9-10.)<sup>6</sup>

Finally, the complaint fails to allege that the purported vertical agreements to adopt a Revenue Management Product's suggested prices produced anticompetitive effects. Plaintiffs do

*also Apple*, 791 F.3d at 314 (fact that horizontal conspirators “were in constant communication regarding their negotiations with both Apple and Amazon [could] hardly be disputed”); *Toys “R Us, Inc. v. FTC*, 221 F.3d 928, 935-36 (7th Cir. 2000) (“direct evidence of communications” between spokes); *Nastasi & Assocs., Inc. v. Bloomberg, L.P.*, No. 20-CV-5428 (JMF), 2022 WL 4448621, at \*12 (S.D.N.Y. Sept. 23, 2022) (“[P]re-determined winning subcontractor would communicate the winning subcontractor bid amount . . . .”).

<sup>6</sup> Nor does the complaint adequately allege a relevant market. Rather, plaintiffs' argument that every room offered by Hotel Defendants on the Strip are reasonable substitutes for each other defies "common sense." (See *supra* p. 7.)

1 not dispute that any supposed vertical agreement by itself would not produce anticompetitive  
 2 effects. Instead, plaintiffs attempt to aggregate the effects of the purported vertical agreements  
 3 between each Hotel Defendant and Rainmaker. (Opp. at 19-20.)<sup>7</sup> But even the authorities on  
 4 which plaintiffs rely hold that such aggregation is impermissible in these circumstances. For  
 5 instance, the Ninth Circuit's precedential opinion in *Gilley II* affirmed the district court's  
 6 conclusion that the complaint did not allege that the vertical agreements "violate the anti-trust laws  
 7 due to their anti-competitive effect," while distinguishing between claims alleging each vertical  
 8 agreement has "a discrete effect on competition" and those alleging "a network of . . . agreements"  
 9 that "allow Defendants to coordinate" pricing. 588 F.3d at 664-65.<sup>8</sup> The court concluded that  
 10 distinction was "critical" because to state a Section 1 claim based only on vertical agreements,  
 11 plaintiffs must allege that each agreement has "a discrete effect on competition." *Id.*

12 That "critical" distinction is dispositive here because plaintiffs do not—and cannot—allege  
 13 that any of the supposed vertical agreements had a "discrete effect on competition." As in *Gilley*  
 14 *II*, the purported anticompetitive effect flows only from the alleged agreement among Hotel  
 15 Defendants to adopt Revenue Management Products' pricing suggestions, but that claim fails  
 16 because plaintiffs do not plead facts plausibly suggesting the existence of any such conspiracy.

## 17 CONCLUSION

18 The complaint should be dismissed with prejudice because plaintiffs cannot answer the  
 19 Ninth Circuit's mandatory pleading questions, plead direct or circumstantial evidence plausibly  
 20 suggesting a horizontal agreement among Hotel Defendants, or state a claim based on their new  
 21 (unpledged) challenge to "vertical agreements." Plaintiffs' unsupported request for leave to amend  
 22 should be denied because they do not identify any facts that would cure the complaint's infirmities.  
 23 See *Dearaujo v. PNC Bank*, No. 12-CV-00981(MMD), 2012 WL 5818131, at \*4 (D. Nev. Nov. 15,  
 24 2012) (denying request for leave to amend because plaintiffs failed to identify "additional facts").

25 \_\_\_\_\_  
 26 <sup>7</sup> The opposition claims that the complaint pleads "direct evidence" of anticompetitive effects.  
 27 (Opp. at 17.) But nothing in the complaint directly demonstrates that any Hotel Defendant's use of  
 Rainmaker's products led to higher room rates or reduced output in the form of lower occupancy.

28 <sup>8</sup> Plaintiffs wrongly claim that the withdrawn opinion in *Gilley I* is "persuasive authority"; contrary  
 to plaintiffs' representation, that decision did not "conclude[] that individual contracts defendants  
 separately executed could be considered in the aggregate." (Opp. at 20 n.68.)

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